J.P. Mascaro & Sons *and* International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 1, Petitioner. Case 4–RC–20920

August 27, 2005

DECISION AND CERTIFICATION OF RESULTS OF ELECTION

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

The National Labor Relations Board has considered objections to an election held December 10, 2004, and the judge's decision recommending disposition of them. The election was conducted pursuant to a Stipulated Election Agreement. The tally of ballots shows 26 for and 41 against the Union, with 9 challenged ballots, an insufficient number to affect the results.

The Board has reviewed the record in light of the exceptions and brief, has adopted the judge's findings and recommendations only to the extent consistent with this Decision, and finds that a certification of results of election should be issued.[1]

We find that the judge erred in sustaining the Petitioner's Objection 1, which alleged that the Employer's agents stood outside the voting area, within 15 feet of the polls, and intimidated voters as they entered to vote. Accordingly, we reverse the judge and overrule the Petitioner's objection.

Facts

This case involves a December 10, 2004 election among employees at the Employer's Berks County, Pennsylvania solid waste collection terminal. The election took place over two sessions, the first between 5 and 8 a.m. and the second between 4 and 6:15 p.m., in the vending/snack room area of the Employer's facility. This room is approximately 16-20 feet long and 8-9 feet wide. It is connected on one end to the garage/maintenance area. The other end of the room is connected to a 10-foot wide hallway which leads to the front door of the facility. Outside the front door is a cement pad or sidewalk which leads to another sidewalk that runs parallel to the front of the building. Beyond the second sidewalk is a parking lot.

The vending/snack room is a high traffic area. Employees typically walk through the vending/snack room when going from the front door and hallway in front of it to the garage area behind it.[2]

On election day, the Employer's president, Pat Mascaro, Sr., who does not have offices at the Berks facility, arrived there at about 5:15 a.m. Mascaro stood in front of the facility for most of the day. On several occasions, Mascaro was standing 30 feet or 10 yards from the front door and at other times he was pacing 5–8 yards back and forth from his original position to locations further away from the front door. Mascaro, the sole witness to testify about his conduct outside the facility on election day, stated:

> Q. . . . did you have any conversations with any of the employees?
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> A. Through the course of the entire day?
>
> Q. Yeah.
>
> A. Yes, there was different points throughout the day. When I got there in the morning, during the morning voting period there was almost no interaction. When I was there, again, I was apprehensive and I wanted to be there to signify the importance of the day. I wasn' t there to materially impact what was going to occur that day . . . I was there and during the morning session hardly anyone really spoke to me. I didn't initiate discussion with anyone. If someone came up to me and said, "Good morning," I'd say "Good morning." If someone walked by me and extended their hand to me I shook their hand. That was like during the morning.
>
> And when the, as it got prolonged more into the day, and guys who might've voted in the morning went out and ran their routes and came back, and they were guys interested in the outcome of the election, some of those people came up to me and had conversations. And that was out near that huge white sign, I think it's a safety sign. That would've been, you know, maybe 90-100 feet from the building . . . . . had no conversations with people entering the voting area to cast their vote. My interaction with anyone coming to vote was at most "Good morning," and a couple of guys, maybe two or three guys, put their hand out to me.

When questioned again on this issue, he explained that:

> I had very little conversation with employees during the course of the day . . . But there came a point in the day, and I don't know really exactly what time, but it was towards the end of the day, when people that obviously

[1] In the absence of exceptions, we adopt pro forma the judge's recommendations to overrule Objections 2, 3, 4, and 5.

[2] The judge said that some supervisors "probably" walked through the room during polling hours. However, he made no express finding on this point.

> voted in the morning and then went out and did their routes came back to the terminal . . . And after they parked their trucks they stayed there and congregated, waiting for the ultimate determination of the election . . .
>
> . . . so towards the end of the day some employees came up to me and initiated discussion, but we were not talking about the election . . .

Based on this testimony, the judge concluded that Mascaro may have shaken hands and talked to employees who had not yet voted.

The Judge's Decision

The judge found that Mascaro's continual presence during the election "just" outside the front door of the facility was objectionable even without considering his conversations and handshaking with employees. The judge noted that Mascaro, as the Employer's president, presided at several "captive audience" meetings in which he urged employees to vote against the Petitioner. The judge also found that there was no reason for Mascaro's presence at the Berks facility on election day apart from making his presence known to potential voters. The judge concluded that Mascaro's conduct amounted to a nonverbal form of "electioneering."

The judge relied on *Nathan Katz Realty, LLC v. NLRB*, 251 F. 3d 981, 991–993 (D.C. Cir. 2001). In that case, the court held that the conduct of two union agents who sat in a car 20 feet from the door of a church in which an election was taking place, and motioned, gestured, and honked at employees as they passed their car substantially impaired the employees' exercise of free choice. .[3] The judge further relied on *Electric Hose & Rubber Co*., 262 NLRB 186 (1982), and *Performance Measurements Co*., 148 NLRB 1657 (1964), cited in *Nathan Katz*, for the proposition that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote. See 251 F.3d at 993.

The judge also found that Mascaro's handshaking and conversations with employees outside the facility independently warranted setting aside the election. Although acknowledging that the rule set forth in *Milchem, Inc*., 170 NLRB 362 (1968), pertains to conversations within the polling area, the judge nonetheless concluded that *Milchem* should apply to a situation where a senior official comes to a facility solely for the purpose of being seen by potential voters and spends the entire day in an area potential voters would normally pass. The judge, therefore, sustained Petitioner's Objection 1 and recommended that the election be set aside based on his extension of the Board's *Milchem* rule.

The Employer excepts to the judge's finding of objectionable conduct based on Mascaro's activities on election day, asserting that all of the decisions relied upon by the judge are distinguishable from the circumstances of this case. For the reasons set forth below, we find merit in the Employer's exceptions.

Analysis

Mascaro's Presence Outside the Facility

As an initial manner, we note that the judge conflated the analyses applied in surveillance and electioneering cases in finding Mascaro's presence, without more, constituted objectionable conduct. The judge reasoned that Mascaro's actions amounted to a nonverbal form of electioneering, but most of the cases he relied upon to support this finding involve allegations of unlawful surveillance. In any event, regardless of whether Mascaro's conduct is analyzed under surveillance or electioneering principles, it was not objectionable.

First, the evidence does not show that the Employer engaged in objectionable electioneering. In *Boston Insulated Wire & Cable Co*., 259 NLRB 1118, 1119 (1982), enfd. 703 F.2d 876 (5th Cir. 1983), the Board set out a series of factors to be considered in electioneering cases, including: (1) the nature and extent of electioneering, (2) whether it was conducted by a party or by employees, (3) whether the conduct occurred in a designated no electioneering area, and (4) whether the conduct contravened the instructions of a Board agent. In that case, union officials distributed campaign literature and spoke to employees just outside a set of glass-paneled doors that opened from the parking lot into a corridor that led to the polling place. Id. at 1118–1119.

In *Boston Insulated*, the Board held that the union's conduct was not objectionable, reasoning that the electioneering took place away from the polling place, was not directed at employees waiting in line to vote, did not occur in a designated no-electioneering zone, and did not violate any instructions of the Board agent. Id. Most significant to the Board was the fact that the glass-paneled doors, which remained closed throughout the polling, effectively insulated voters from the electioneering. Id. See also *Harold W. Moore & Son*, 173 NLRB 1258 (1968) (no objectionable electioneering, where

[3] The court vacated the Board's decision in 331 NLRB No. 22 (2000) (not reported in Board volumes), and remanded the case. In 331 NLRB No. 22, the Board, on the General Counsel's Motion for Summary Judgment, had found that the employer had unlawfully refused to bargain with the union, relying on its unpublished decision overruling the employer's objections to the election and certifying the union as the exclusive representative of the unit.

conversations were 30 feet from the building entrance, with voting area 30 feet inside entrance).

In the instant case, the Petitioner produced no evidence that Mascaro engaged in any electioneering. Although Mascaro had conversations with some of the voters, there is no evidence that any of these conversations related to the election. Even assuming, arguendo, that Mascaro's conduct could be characterized as a nonverbal form of electioneering, that conduct is not objectionable electioneering under the factors articulated in *Boston Insulated*. Mascaro's activities took place well outside the front entrance, which, in turn, was separated from the polling place by a 10-foot wide hallway. Mascaro never entered a designated no-electioneering zone, and never violated any instruction of the Board agent. Moreover, there is no evidence that the Petitioner complained to the Board Agent about Mascaro's conduct during the election when the Agent might have been able to stop the activity.

Nathan Katz, supra, on which the judge substantially relied, is distinguishable. In that case, the D.C. Circuit reversed and remanded as inconsistent with other Board precedent a Board determination that union agents had not engaged in objectionable conduct. However, in *Nathan Katz*, unlike the instant case, the facts, assumed by the Regional Director to be true, reflected that the union agents' conduct occurred within a designated no-electioneering zone in a spot employees had to pass in order to vote. On these facts, there was a contravention of the instructions of the Board agent, and the employer therefore objected to the conduct. 251 F.3d at 991. See also *U-Haul Co. of Nevada, Inc*., 341 NLRB No. 26 at 3 (2004) (distinguishing *Katz* because, among other things, there was no evidence that the union representative was in an established no-electioneering zone).

We also find, contrary to the judge, that Mascaro's presence did not constitute objectionable surveillance. Here there is insufficient evidence to establish that employees had to pass by Mascaro in order to vote. Conversely, in *Performance Measurements*, 148 NLRB at 1659, the employer's president stood by the door to the election area for prolonged periods and employees had to pass within 2 feet of him to gain access to the polls. The Board held that "the continued presence of the Employer's president at a location where employees were required to pass in order to enter the polling place was improper conduct . . . ." Id. Similarly, in *Electric Hose*, 262 NLRB at 216, the Board found objectionable one supervisor's presence 10–15 feet from the entrance of the voting area and two other supervisors' presence in areas that employees had to pass in order to vote. The Board reasoned that the only plausible explanation for the supervisors' conduct was to convey to employees that they were being watched. Id. In addition, in *ITT Automotive*, 324 NLRB 609 (1997), enfd. in part 188 F.3d 375 (6th Cir. 1999), the "continued presence" of managers standing in a circle in an area where employees had to pass through to vote and where the managers observed the employees waiting in line to vote interfered with the election. Id. at 623–625.

These surveillance cases, all of which were cited by the judge, are distinguishable from this case. In *Electric Hose*, *Performance Measurement*, and *ITT Automotive*, the company officials were either much closer to the voting area than Mascaro was, or employees had to pass the company officials as they entered the polling area. Here, although Mascaro was positioned outside the facility for most of the day, he was not, contrary to the judge, "just outside" the front door. Rather, Mascaro was at least 30 feet and on several occasions as far away as 54 feet from the front door of the facility. In addition, Mascaro had no direct view of the vending/snack room area. Although he could see who entered the facility, he had no way of knowing who was entering to vote and who was entering to perform job related duties or to eat and drink in the vending/snack room. This case is much closer to *Blazes Broiler*, 274 NLRB 1031, 1032 (1985), where the Board found no objectionable conduct in a union agent's sitting in a restaurant approximately 30 feet from the polling area because the agent had no direct view of the entrance to the voting area; the Board noted that although the agent "could see who entered the hallway leading to the banquet room . . . [h]e had no way of knowing who was entering the hallway to vote . . . ."

Mascaro's Handshaking and Conversations with Employees

We find, contrary to the judge, that Mascaro's handshaking and conversations with employees outside the facility did not violate the *Milchem* [4] rule. The Board's *Milchem* rule prohibits "prolonged conversations between representatives of any party to the election and voters waiting to cast ballots." See, e.g., *U-Haul*, 341 NLRB No. 26 at 3 (although union representative spoke to a small number of voters, his conduct did not violate *Milchem* rule where the conversations did not occur in the voting area, the waiting area, or near the line of voters). Here, there is no evidence that Mascaro had prolonged conversations with employees or that any conversations occurred in the polling area, or near the line of voters.

For all of the foregoing reasons, we find Mascaro's conduct outside the Employer's facility on election day insufficient to warrant setting aside the election. Accord-

[4] *Milchem, Inc*., 170 NLRB 362, 362 (1968).

ingly, we overrule Petitioner's Objection 1 and, as the Petitioner has failed to secure a majority of the valid ballots cast, we shall certify the results of the election.[5]

CERTIFICATION OF RESULTS OF ELECTION

IT IS CERTIFIED that a majority of the valid ballots have not been cast for International Association of Machinists & Aerospace Workers, AFL–CIO, District Lodge 1, and that it is not the exclusive representative of the bargaining unit employees.

Dated, Washington, D.C. August 27, 2005

Robert J. Battista , Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER LIEBMAN, concurring:

Employer president Mascaro's continual presence outside the facility where he had no office for most of the election raises troublesome questions. This was certainly an unusual event, which in some circumstances might well have impaired employees' exercise of free choice in the election. Nonetheless, in the circumstances here—Mascaro did not stand in any designated no-electioneering area, he had no direct view of the polling place from where he stood, the Union never objected to his presence, and there was no other objectionable conduct – I would not set aside the election.

In theory, the election process would be pristine if the Board prohibited all parties from observing and greeting employees at the workplace on their way to vote. But that is not the law. My colleagues emphasize that they would reach the same result here had a union agent stood outside the facility. This statement is welcome. Still, I would hasten to add that an employer's presence on election day sends a far different message to employees than a union's presence. The fundamental fact is that "[a]n employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant." *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969). Under these circumstances, I concur.

Dated, Washington, D.C. August 27, 2005

Wilma B. Liebman, Member

NATIONAL LABOR RELATIONS BOARD

David L. Porter, Grand Lodge Representative, of Cincinnati, Ohio, for the Petitioner.

Mark S. Shiffman, Esq., (Jackson Lewis LLP), of Pittsburgh, Pennsylvania, for the Employer.

RECOMMENDED DECISION ON OBJECTIONS

ARTHUR J. AMCHAN, Administrative Law Judge. Pursuant to a January 12, 2005 Notice of Hearing, I heard evidence in this matter on February 3, 2005 in Philadelphia, Pennsylvania.

This case arises pursuant to the Petitioner's objections to the conduct of a December 10, 2004 secret ballot election in an appropriate unit of all full-time and regular part-time drivers, helpers, slingers and mechanics employed by the Employer at its Reading (Berks County), Pennsylvania solid waste collection terminal. The election was conducted in two sessions, the first between 5 and 8 a.m. and the second between 4. and 6:15 p.m. Seventy-six ballots were cast; 26 for the petitioner, 41 against and 9 ballots that were challenged.

The objections before me, as set forth in the Notice of Hearing, are as follows:

Objection 1. Pat Mascaro, Sr., Pat Mascaro, Jr., Mike Mascaro and Attorney Bill Fox were viewed standing outside the voting area within 15 feet of the polls intimidating voters as they entered. This was witnessed by various employees and Union officials Gary Anthony and Stephen Miller.

Objection 2. Owner Pat Mascaro, Sr. also intimidated and restrained voters and was quoted as saying before the election in the parking lot, "Do not vote for the union. I will take care of you and your problems." And telling employees "the family will take care of the union guys."

Objection 3. Owner Pat Mascaro, Sr. [made] promises to correct all of the overtime issues and problems if employees voted against the union, in a captive audience meeting.

Objection 4. Supervisors James Martzolf, Al, and Shorty and office workers Mary Beth Reid and Sonya Gorostieta entered the voting area for the purpose of intimidation and to restrain employees. [T]he opportunity for a sterile election was contaminated by this conduct.

Objection 5. Employer and its representative had an anti-union sign posted within the election area the morning of the election.

Prior to the election, the Employer conducted four mandatory meetings for employees regarding the Union's organizing campaign. The last meeting was conducted on December 8, 2004, 2 days before the election. The only persons who attended any of these meetings who testified at the instant hear-

[5] We emphasize that we would reach the same result if this case had involved one of the union officials standing outside the Employer's facility for the entire day.

ing were the Employer's attorney, Bill Fox, and the Employer's President, Pasquale "Pat" Mascaro Sr.

At one meeting, Fox told employees that they could be permanently replaced in the event of an economic strike. He also said that if they were permanently replaced, the employees would have to pay their own hospitalization and would not receive unemployment insurance benefits. Fox also said:

> . . . that they'd be put on a list for recall, but there was no guarantee that they would be recalled for their position . . . I didn't say they would never be recalled. I said they could be permanently replaced with other employees and they'd be put on the list, and if a position came open, it would be drawn from that list. It's just like you'd send out letter to the same effect.

[Tr. 131–132.]

At the last meeting on December 8, Pat Mascaro Sr. entertained some questions from employees. In response to one, he told employees that it was obvious to him that "we need to improve some things around here. But the law does not allow me to address those issues." He also drew an analogy between employees selecting the Union and a married couple inviting a third person into bed with them to help them resolve marital problems.

The election was conducted in the vending/snack room area of Respondent's Berks County facility. This room is approximately 16-20 feet long and 8-9 feet wide. It is separated from the front door of the facility by a 10-foot wide hallway. Outside the front door, as depicted in Employer's Exhibit 1`is a cement pad or sidewalk which leads to another sidewalk which runs parallel to the face of the building. Beyond the second sidewalk is a parking lot.

The voting room is a high traffic area. Indeed, employees normally walk through the vending/snack room on their way between the front door and hallway in front of it and the garage areas behind it. Employees and probably some supervisors walked through the room during polling hours. The employer's in-house attorney, Bill Fox, offered the Board agent a different room in which the hold the election; the Board agent declined the offer. The Union agreed to conducting the election in the snack room.

During a pre-election conference which started at about 4:45 a.m., union representatives noticed a flyer relating to the Employer's desire or policy to remain nonunion on the wall of the vending area. When they mentioned the flyer to Fox, he told them to take the flyer down. This flyer was removed from the wall before voting began.

Voting began shortly after 5:00 a.m. At various times while the polls were open, a number of company officials were observed standing on the cement pad just outside the front door to the facility. These included Pat Mascaro Sr., Pat Mascaro Jr., a management trainee, Mike Mascaro, the general manager, Al Cataldi, a supervisor, and Attorney Bill Fox. There is no evidence as to how long these individuals stood at the front door with the exception of Cataldi, who stood there for 10–15 minutes shortly after the polls opened.

The Employer's President, Pat Mascaro Sr., and its Attorney, Bill Fox, work at the employer's headquarters in Harleysville, Pennsylvania, approximately 28 miles east of the Berks County facility. They do not have offices at the Berks facility. On election day, December 10, 2004, Fox spent most of his time working on unrelated matters on the second floor of the Berks facility. Pat Mascaro Sr. arrived at the Berks facility at about 5:15 a.m.

Pat Mascaro, Sr., spent virtually the entire day out in front of the Berks facility. Sometimes he was pacing back and forth on the sidewalk in front of the facility, other times he was standing still. On at least one occasion, Pat, Sr., entered the facility and went to the offices on the second floor. To get to these offices he entered the front door, turned left and went up a staircase.

Pat Mascaro, Sr., testified that, with one brief exception, he was never closer to the front door than 30-35 feet, or 10-11 yards. He also testified that on average he was 50-55 feet (17-18 yards) from the front door and sometimes as far away as 90 feet or thirty yards. Grand Lodge Representative Stephen Miller testified that at about 7:55 a.m., while the polls were still open, he observed Mascaro at a location 15-20 feet from the front door. I find that on a number of occasions, Pat Sr., was standing 30 feet or 10 yards from the front door and on other occasions was pacing 5-8 yards back and forth from his original position to locations further away from the front door. On two occasions at trial, Mascaro testified as to his activities outside the Berks facility on election day. On being called to the stand by the Union, Mascaro stated:

> Q. …did you have any conversations with any of the employees?
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> A. Through the course of the entire day?
>
> Q. Yeah.
>
> A. Yes, there was different points throughout the day. When I got there in the morning, during the morning voting period there was almost no interaction. When I was there, again, I was apprehensive and I wanted to be there to signify the importance of the day. I wasn' t there to materially impact what was going to occur that day…I was there and during the morning session hardly anyone really spoke to me. I didn't initiate discussion with anyone. If someone came up to me and said, "Good morning," I'd say "Good morning." If someone walked by me and extended their hand to me I shook their hand. That was like during the morning.
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> And when the, as it got prolonged more into the day, and guys who might've voted in the morning went out and ran their routes and came back, and they were guys interested in the outcome of the election, some of those people came up to me and had conversations. And that was out near that huge white sign, I think it's a safety sign. That would've been, you know, maybe 90-100 feet from the building…
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> . . . I had no conversations with people entering the voting area to cast their vote. My interaction with anyone coming to vote was at most "Good morning," and a couple of guys, maybe two or three guys, put their hand out to me.

[Tr. 89–91.]

The employer's counsel also asked Pat Mascaro Sr., about his conversations with employees:

> I had very little conversation with employees during the course of the day…But there came a point in the day, and I don't know really exactly what time, but it was towards the end of the day, when people that obviously voted in the morning and then went out and did their routes came back to the terminal…And after they parked their trucks they stayed there and congregated, waiting for the ultimate determination of the election . . .
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> . . . so towards the end of the day some employees came up to me and initiated discussion, but we were not talking about the election . . .

Tr. 141–142.

While this testimony speaks for itself in establishing that Mascaro shook hands with employees and had conversations with them, while the polls were still open, he had no way of knowing that he only talked to employees who had already voted. I therefore find that he may have shook hands and conversed with employees who had not yet voted.

Analysis

I overrule Objections 2, 3, 4 and 5 simply on the basis that there is no evidence of record to support the allegations therein.[1] With regard to objection 5, it is clear that the poster in question, even assuming it was objectionable, was removed from the wall before any employees entered the voting area. However, I sustain Objection 1 regarding the conduct of Pat Mascaro Sr., on the day of the election.[2]

Pat Mascaro's day-long presence just outside the front door of the facility was sufficient to warrant setting aside the election even in the absence of the evidence regarding his conversations and hand-shaking with employees. Pat Mascaro Sr., is President of the employer and had presided at several recent "captive audience" meetings in which he had encouraged employees to vote against representation. Moreover, he did not work at the Berks' facility and had no reason to be there on December 10, 2004, apart from making potential voters aware of his presence. His conduct, therefore, constitutes a nonverbal form of "electioneering."

In *Nathan Katz Realty, LLC v. NLR.B,* 251 F.3d 981, 991–993 (D.C. Cir. 2001), the Court of Appeals reversed the Board and voided a representation election in somewhat similar circumstances. Two union agents sat in a car twenty feet from the door of a church in which the election was taking place, motioning, gesturing and honking at employees as the passed their car. They were parked within what the Board Agent had designated a no-electioneering zone outside the church. The Court read relevant Board precedent to hold that a party engages in objectionable conduct sufficient to set aside an election if one of its agents is continually present in a place where employees have to pass in order to vote. The Court found the union agents' presence outside the church to be conduct sufficient to set aside the election even if the agents did not actually talk to any employee.

In one of the cases cited by the Court of Appeals, *Electric Hose & Rubber Co.,* 262 NLRB 186, 216 (1982), a supervisor was stationed 10 to 15 feet from the entrance to the voting area. Contrary to Pat Mascaro's situation, this supervisor was near his normal work area. However, the Board held that, "[w]ithout any explanation for a supervisor to be "stationed" outside the voting area, it can only be concluded that his purpose in observing the event was to effectively survey the union activities of the employees and to convey to these employees the impression that they were being watched. This conduct is found to have destroyed the laboratory conditions necessary for the conduct a free and fair election.

Another case relied upon by the Court of Appeals is *Performance Measurements Co.,* 148 NLRB 1657, 1659 (1964). In that case, the employer's president stood by the door to the election area so that it was necessary for each employee to pass within 2 feet of him to gain access to the polls. On two occasions, the company president entered the polling area and then immediately left. The Board held:

> While we agree that the brief forays into the election area alone may not tend to interfere with the free choice of employees, the continued presence of the Employer's president at a location where employees were required to pass in order to enter the polling place was improper conduct not justified by the fact that for part of the time he was instructing supervisors on the release of employees for voting purposes. We find that by this conduct the Employer interfered with employees' freedom of choice in the election.

Also see, *ITT Automotive, a Division of ITT Corp.,* 324 NLRB 609, 623–625 (1997); But see *Mountaineer Park, Inc.,* 343 NLRB No. 135, slip op. 12 (2004), as well as *Standard Products, Inc.,* 281 NLRB 141, 164 (1986).

Additionally, I find the election must be set aside on account of Pat Mascaro's hand shaking and conversations with employees outside the Berks terminal. In *Milchem, Inc.,* 170 NLRB 362 (1968),[3] the Board enunciated its standard for measuring the effect of conversations between parties to the election and employees preparing to vote.

> Careful consideration of the problem now convinces us that the potential for distraction, last minute electioneering or pressure, and unfair advantage from prolonged conversations between representatives of any party to the election and voters waiting to cast ballots is of sufficient concern to warrant a strict rule against such conduct without inquiry into the nature of the conversations.

[1] Assuming that I could consider the statements made by Respondent's attorney, Bill Fox, in a meeting with employees regarding the replacement of strikers, it appears that his remarks were not objectionable, *Eagle Comtronics, Inc.,* 263 NLRB 515 (1982).

[2] Assuming that Pat Mascaro's conduct does not exactly coincide with the precise wording of objection number one, it is sufficiently related to be considered by the Board. Moreover, his day-long presence outside the Berks facility and interaction with employees was fully litigated, *Hollingsworth Management Service,* 342 NLRB No. 50 (2004); *Precision Products Group, Inc.,* 319 NLRB 640 fn. 3 (1995); *Fiber Industries,* 267 NLRB 840 fn. 2 (1983).

[3] In the bound volume 170, the name of this case is rendered as *Michem, Inc.* although in the body of the decision the correct name of the employer was *Milchem, Inc.* [with an "l"].

> . . . The difficulties of recapturing with any precision the nature of the remarks made in the charged atmosphere of the polling place are self-evident, and to require an examination into the substance and effect of the conversations seems unduly burdensome and, in this situation, unnecessary. Finally, a blanket prohibition against such conversations is easily understood and simply applied.
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> . . . Additionally, by attaching a sanction to its breach, the rule assures that the parties will painstakingly avoid casual conversations which could otherwise develop into undesirable electioneering or coercion.

While the Board in *Milchem* at one point talked in terms of *sustained* conversations with prospective voters and at another point *prolonged* discussions, it made very clear that it was addressing the type of conduct herein.

> . . . this does not mean that any chance, isolated, innocuous comment or inquiry by an employer or union official to a voter will necessarily void the election. We will be guided by the maxim that "the law does not concern itself with trifles." We trust, however, that the parties to elections, in order to obviate the sometimes troublesome task of what is to be considered trifling, will take pains to assure complete compliance with the rule by instructing their agents, officials, and representatives to refrain from conversing with prospective voters in the polling area.

Mr. Mascaro's contact and conversations with employees, who may have been prospective voters was not chance or isolated. Although the *Milchem* rule is concerned with conversations within the polling area, I find that it should also apply to the instant situation in which the employer's president came to the facility solely for the purpose of being seen by potential voters and spent the entire day in an area in which potential voters would normally pass. Indeed, the Board may have already applied this rule to conversations outside of the polling area, *Volt Technical Corp.*, 176 NLRB 832, 836–837 (1969).

The same considerations which led the Board to eschew an examination into the substance of conversations leads me to conclude no examination is required into whether the employees with whom Mr. Mascaro had conversations were employees who were waiting to vote, or employees who had already voted. Therefore, extrapolating from the *Milchem* rule, I find that the December 10, 2004 election should be set aside and a new election be held.

CONCLUSION

Because I have sustained Objection 1 the election must be overturned. This case is remanded to the Regional Director for Region 4 to hold a new election at a time and under circumstances he thinks appropriate. The notice for the new election shall included a statement of the reason for the second election, see *Fieldcrest Cannon, Inc.*, 327 NLRB 109, 110 (1998).[4]

Dated: Washington, D.C. March 16, 2005.

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[4] Pursuant to Sec. 102.69 of the Board's Rules and Regulations, any party may, within fourteen (14) days from the date of this recommended decision, file with the Board in Washington, D.C., an original and eight (8) copies of exceptions thereto. Immediately upon the filing of such exceptions, the party filing them shall serve a copy on the other parties and shall file a copy with the Regional Director of Region 4. If no timely exceptions are filed, the Board will adopt the recommendations set forth herein.